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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNCIL ON LABOR LAW EQUALITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a national association of large and small employers formed to monitor the activities of the National Labor Relations Board and related developments under the National Labor Relations

Act and to provide support to employer interests on those issues which affect a broad section of industry. COLLE was formed in recognition of the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy. It is within the interest of employers throughout the nation to assure that the Board's remedial authority is confined to its appropriate sphere and invoked under procedural strictures sufficient to permit informed judicial review.

COLLE filed a brief amicus curiae in support of the position of Conair Corporation in the District of Columbia Circuit in this case.* This brief amicus curiae is filed with the consent of the parties as provided for in the rules of this Court.

ISSUE PRESENTED FOR REVIEW

Whether the National Labor Relations Board has the remedial authority to order an employer who has committed unfair labor practices to bargain with a union that has neither won a certification election nor secured a card majority.

DECISION BELOW

A panel of the District of Columbia Circuit held, over Judge Wald's dissent, that the NLRB does not have authority to issue nonmajority bargaining orders. *Conair Corp.* v. *NLRB*, 721 F.2d 1355 (D.C. Cir. 1983).

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* COLLE also has previously filed briefs amicus curiae in this Court and in *NLRB v. Transportation Management*, 82-168; *Red Ball Motor Freight, Inc. v. NLRB*, 81-1605; and *Pioneer Finishing Corporation v. National Labor Relations Board*, 81-2162

ARGUMENT

I. INTRODUCTION

From the time that the founders of this nation severed the colonies from the crown, there has been one cardinal principle, above all others, that describes the way we are governed: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of a representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Baker v. Carr*, 369 U.S. 186 (1962)(state legislative apportionment); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)(racially based gerrymandering); *United States v. Classic*, 313 U.S. 299 (1941) (alteration of ballots); *United States v. Mosley*, 238 U.S. 383 (1915) (right to have vote counted); *Ex Parte Siebold*, 100 U.S. 371 (1880) (ballot box stuffing). Our fidelity to the freedom of electoral choice springs from the recognition that "[o]ther rights, even the most basic are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

This principle is no less important in the context of a union election. "The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative processes bring to the nation." *Thomas v. Collins*, 333 U.S. 516, 546 (1945) (Jackson, J., concurring). Indeed, the impact of one's vote to select or reject a bargaining representative is more directly felt, in every day life terms, than his vote to elect a legislative representative in a distant state capitol or an even more remote Washington. For this reason, the overriding purpose of the National Labor Relations Act is to assure that employees are represented by a representative *of their own choosing* for the purpose of collective bargaining.

The decision below does no more than sustain the traditional principle regarding the right to vote for one's own representative as that basic right is codified in the NLRA.

II. THE DECISION BELOW IS NOT INCONSISTENT WITH THE HOLDING IN *NLRB V. GISSEL PACKING CO.*, 395 U.S. 486 (1969).

A. The Holding

Gissel arose on the consolidated consideration of four cases[1] which originated in different factual settings but contained two common threads: serious unfair labor practices by an employer during a union recognition campaign; and authorization cards signed by a majority of the employees. Chief Justice Warren articulated the issues before the Court as follows:

> The specific questions facing us here are whether the duty to bargain can arise without a Board election under the Act; whether union authorization cards, if obtained from a majority of employees without misrepresentation or coercion, are reliable enough generally to provide a valid, alternate route to majority status; whether a bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union's majority and make a fair election an unlikely possibility. 395 U.S. at 579.[2]

In the series of decisions under review, the Fourth Circuit, contrary to the First Circuit, had held that a bargaining order

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[1] The decisions reviewed in *Gissel* were NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968), *modifying* 157 N.L.R.B. 1065 (1966); NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968), *modifying* 166 N.L.R.B. 186 (1967); General Steel Prods., Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968), *modifying* 157 N.L.R.B. 636 (1966); NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968), *enforcing* 164 N.L.R.B. 261 (1967).

[2] An additional question, not relevant here, concerned the First Amendment implications of certain employer statements alleged to be unfair labor practices.

was not an appropriate remedy for unfair labor practices that undermine a union's card majority. Its holding was based upon the inherent unreliability of authorization cards and the conclusion that the Taft-Hartley amendments altered the effect of prior decisions by eliminating all avenues of union recognition beyond Board certification following an election.

The Court unanimously rejected the Fourth Circuit's position by holding tht election and certification, although the "most commonly traveled route," was not the only method for acquiring exclusive bargaining rights. It concluded that Taft-Hartley did not alter its prior decisions because, while making election the sole basis for certification, it did not abrogate the employer's continued duty to bargain with a union which had established majority status by other means. The Court buttressed its conclusion by acknowledging that language which would have eliminated recognition of a card majority was removed from the final draft of the bill. 395 U.S. at 598.

Having concluded that certification following an election was not the sole route to recognition, the Court considered whether authorization cards were inherently unreliable. Deferring to the Board's ability to limit card abuse, the Court refused "to agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else." 395 U.S. at 607.

The employers argued that these conclusions left them with a Hobson's choice. They would either commit unfair labor practices in conducting an immediate investigation into whether the union represents an uncoerced majority or fail to satisfy the Board's standard that they have a good faith doubt as to majority status before refusing to bargain. This contention was rejected upon the proposition that an employer is not obligated to investigate employee status in order to demand an election; and, if he elects to do so, may undertake reasonable investigatory steps, under Board rules, without committing unfair labor practices. 395 U.S. at 609-10.

With the employers argument resolved against them, the Court compartmentalized the scope of the Board's bargaining order authority into three distinct unfair labor practices categories. Under Category I, the employer's misconduct is so aggravated that its "coercive effects cannot be eliminated by the application of traditional remedies" and, therefore, no unlawful refusal to bargain—or even a bargaining demand—need be found for a bargaining order to issue. 395 U.S. at 614. Category II consisted of "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede election processes"; and a bargaining order should issue only when "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order." 395 U.S. at 614-15. Category III involved "minor or less extensive unfair labor practices" which result in minimal disruption of the election process and will not support issuance of a bargaining order. 395 U.S. at 615.

Identifying the factual situations before it in *Gissel* as Category II violations, the Court delineated its holding with precision:

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.

395 U.S. at 614. As the Court noted, the scope of its *Gissel* ruling goes no further than situations in which the union, at some point, had a majority.

B. The Obiter Dicta

The dispute at bar is not governed by the narrowly defined lines that compose the *Gissel* ruling. However, in introducing the Category I situation, the Court issued the following dicta that was totally foreign to the facts before it:

> Despite our reversal of the Fourth Circuit below ... on all major issues, the actual area of disagreement between our position here and that of the Fourt Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, *without need of inquiry into majority status on the basis of cards or otherwise,* in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." NLRB v. Logan Packing Co., 386 F2d 562, 570 (CA4th Cir. 1967); see also NLRB v. Heck's, Inc. 398 F2d 337, 338.

395 U.S. at 613-14 (emphasis added).

The citation of the two Fourth Circuit decisions in the referenced quotation further mitigates the viability of *Gissel* as authority for the issuance of nonmajority bargaining orders. In *Hecks, Inc.*, the lower court denied enforcement of a Board bargaining order to a card majority union because the factual situation was not one of those "extraordinary cases in which a bargaining order might be an appropriate remedy..." 398 F.2d at 339. In *Logan Packing,* the court refused to enforce a bargaining order based on a card majority because the employer's unfair labor practices were "very minimal infractions". 386 F.2d at 570. Having resolved the case before it, the Fourth Circuit, in its own dicta, suggested that, in "exceptional cases, the Board *may* have the power to impose a bargaining order ...

without need of answering the question of whether the union ever obtained majority status." 386 F.2d at 570. (emphasis added).

Thus, it is clear that the *Gissel* reference to nonmajority bargaining orders was dicta based on lower court dicta. As the commentators have recognized, "Not even remotely did the Supreme Court intimate that this was *its* view ... [T]he Court was adverting to language in *Logan Packing*, where the Fourth Circuit was discoursing on an obviously hypothetical, if not far-fetched situation, and was not expressing a legal position—the issue was not before it."[3]

Although a landmark decision in many respects, *Gissel* does not stand for the proposition that the Board may issue a bargaining order on behalf of a union that has never received majority authorization.

III. THE DECISION BELOW DOES NOT CREATE A GENUINE CONFLICT IN THE CIRCUITS

Before *Gissel*, the Board consistently declined to order bargaining to remedy employer unfair labor practices when the union had not obtained a card majority. Thus, in *W.H. Elson Bottling Company*, 155 NLRB 714 (1965), *enforced as modified*, 379 F.2d 223 (6th Cir. 1967), the Board, acknowledging that "the possibility is strong that but for [the employer's] unlawful conduct the Union would have ultimately" attained majority status, concluded that "in consideration of the majority principle ... of the Act ... the policies of the Act [do not]

[3] Platt, *The Supreme Court Looks At Bargaining Orders Based On Authorization Cards*, 4 U.Ga.L.Rev. 779, 797 (1970); *see also* Note, *Bargaining Orders Since Gissel Packing: Time to Blow The Whistle On Gissel*, 1972 Wis.L.Rev. 1170, 1182. Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union Has Never Attained a Majority*, 29 Labor L.J. 631 (1978); Note, *NLRB v. Gissel Packing Co.: Bargaining Orders and Employee Free Choice*, 45 NYUL Rev. 318, 344 n. 88 (1970).

require or even permit the issuance of a bargaining order where majority status has been attained." 155 NLRB at 715-16.[4] This policy did not change in the immediate aftermath of *Gissel;* and the Board repeatedly rejected nonmajority bargaining orders entered by Administrative Law Judges under the authority of *Gissel.*[5]

A potential policy change arose in the series of decisions involving *United Dairy Farmers Coop. Ass'n,* 242 NLRB 1026 (1978), *remanded,* 633 F.2d 1054 (3d Cir. 1980), *on remand,* 257 NLRB ____ (1981). There, in light of a documented record of pervasive and egregious unfair labor practices trenching upon a free election, the Board issued three separate opinions with respect to its authority to issue a bargaining order in the absence of a union's majority status. The plurality, composed of two members, suggested that the Board *may* have the authority to compel bargaining with a nonmajority union in appropriate cases, but declined to do so on the facts; two members dissented on the ground that the order should have been entered; Member Penello concurred in the judgment but dissented from the conclusion that authority existed to enter bargaining orders in derrogation of the majority rule precept.

The Third Circuit confronted the issue on petitions for review and cross-application for enforcement. Enforcing the Board's conclusion that the employer's conduct was sufficiently offensive to set aside an election that the union had lost, the court felt compelled, in light of Member Penello's opinion, to review the Board's authority to issue a nonmajority bargaining order as an additional remedy.

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[4] See also Int'l Union of Electrical Radio & Machine Workers, 159 NLRB 1795 (1966), *enf'd as modif'd, 383 F.2d 230* (D.C. Cir. 1967), *cert denied,* 390 U.S. 904 (1968); J.P. Stevens & Co., 157 NLRB 869 (1966), *enf'd as modif'd,* 380 F.2d 292 (2d Cir. 1967), *cert denied,* 389 U.S. 1005 (1967).

[5] *See, e.g.,* Fuqua Homes Missouri, Inc., 201 NLRB 130 (1973); GTE Automatic Electric, Inc., 196 NLRB 902 (1972); The Loray Corp., 184 NLRB 557 (1970).

Although the decision may be viewed as an advisory opinion at best and judicial over-reaching at worst, a panel of the Third Circuit concluded that *Gissel* stood for the following proposition:

> The failure to recognize the authority of the Board to issue bargaining orders in these circumstances would undermine the underlying goal of the Act to further the majority preference of all employees. Unions which would have attained a majority in a free and uncoerced election if the employer had not committed unfair labor practices would be deprived of recognition merely because of the employer's illegal conduct.

633 F.2d at 1068 (footnote omitted). Accordingly, the case was remanded to the Board to consider whether the underlying facts justified the issuance of a nonmajority bargaining order.[6]

On remand, the Board directed the employer to bargain with the union. However, at the time of the decision, two seats on the Board were vacant and member Zimmerman, who was

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[6] Whether *United Dairy* represents a majority view in the Third Circuit is open to question. In cases in which a bargaining order is granted to a union that represents a dissipated majority, that court's approach has been characterized "guerilla warfare against *Gissel* orders ...." NLRB v. K & K Gourmet Meats, Inc., 640 F.2d 460, 671 (3d Cir. 1981)(Gibbons, J., dissenting):

> It is no secret that at least a significant minority of the members of this court believe that the Supreme Court in [*Gissel*] erred in interpreting the National Labor Relations Act to permit the National Labor Relations Board to enter a bargaining order as a remedy for unfair labor practices committed in the course of an organizing campaign. Nor is it any secret that those judges who are uncomfortable with the *Gissel* construction of the statute have been signalling the Board vigorously that bargaining orders are unwelcome in this circuit. At the same time the Board is receiving from a different group of judges on this court a quite different signal.

Id. at 670 (citations omitted).

appointed after the Board's first *United Dairy* decision, felt compelled to supply the deciding vote on the ground that the Third Circuit's decision was binding on the Board in the context of that case. He, therefore, felt it unnecessary to decide whether the Board had the general authority to issue nonmajority bargaining orders.

Thus, prior to the Board's decision below, a majority of the full Board had *never* ordered an employer to bargain with a union that had not established majority status as a remedy for unfair labor practices.

IV. THE MERITS

The NLRB's attempt to order an employer to bargain with a union that has never attained majority status is erroneous because an order of this nature: (a) is not authorized by the text of the National Labor Relations Act; (b) would compel the employer to engage in prohibited conduct; (c) is beyond the scope of the Board's remedial authority; and (d) transcends the Board's role in the administration of labor policy.

A. National Labor Relations Act

From its inception, the basic thrust of the NLRA has been to protect the right of employees to select union bargaining representatives in a free and uncoerced manner. By its own terms, the Act provides employees with the right to select bargaining representatives "of their own choosing." 29 U.S.C. §157. Simultaneously, through the 1947 Taft-Hartley amendments, employees have the "right to refrain from any or all of such activities." 29 U.S.C. §157. Moreover, representatives selected "by a majority of the employees" are entitled to exclusive representation of those employees. 29 U.S.C. §159(a).

The literal text of the Act discloses three basic propositions: majority rule: the protection of minority rights; and absolute freedom of choice. Strict adherence to these postulates is essential to promote the Act's objective of industrial peace. That majority rule was the critical feature of the Wagner Act is

evidenced by Senator Wagner's recognition of the underlying principle of the Act that bore his name:

> [D]emocracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.

79 Cong.Red. 7571, II Legis.Hist. 2337 (1935).

As the congressional mandate translates to union election practices, it is clear beyond purview that, "[i]n their selection of a bargaining representative, §9(a) of the Wagner Act guarantees employees freedom of choice and majority rule." *Intern'l Ladies Garment Workers v. NLRB*, 366 U.S. 731, 738 (1961). Thus, "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973):

> The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union.

414 U.S. at 280. Here, the Board did more than "cast their weight." It selected, in its bureaucratic wisdom, a bargaining representative for employees whose freedom of choice was freely cast asunder. The Act not only fails to authorize this result, but expressly forbids it.

B. The Order Compels A Prohibited Practice

A second statutory barrier to the order issued by the NLRB arises from the fact that the Act makes it an unfair labor practice for an employer to interfere with the organizational rights of employees or to support a particular labor organization. These provisions have been construed to prohibit an employer from recognizing a minority union.

The issue was confronted directly in *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 732-38 (1961), where this Court found it an unfair labor practice for an employer to bargain with a minority union:

> [The employer] granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgment of §7 of the Act, assuring employees the right "to bargain collectively through representatives of their own choosing" or "to refrain" from such activity. It follows, without need of further demonstration, that the employer activity found present here violated §8(a)(1) of the Act which prohibits employer interference with, and restraint of, employee exercise of §7 rights.

A minority bargaining order violates the underpinnings of *Ladies Garment Workers*. The minority union would have a Board sanctioned "marked advantage" of the type condemned by the Court; and its selection would trench upon the protected prerogatives of the employees under the Act. The Board, having historically construed the Act—with judicial approval—to prohibit the recognition of minority unions, should not now be allowed to turn a shield into a weapon.

C. The Order Exceeds The Board's Remedial Authority.

The Board's broad remedial authority is not without limitation. Traditionally, it has been employed to restore the status quo ante in order to facilitate the objectives of the Act in an atmosphere of freedom of choice. Thus, in *Gissel*, the Court concluded that the authority to issue a bargaining order to a card majority union was the "only fair way to effectuate employee rights [and] to reestablish the conditions as they existed before the employer's unlawful campaign." 395 U.S. at 612.

However, the Board's authority to order affirmative action "does not go so far as to confer punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938); *see United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961).

The authority to command affirmative action is, therefore, confined by the sphere of the Act's literal objectives. In order to justify judicial enforcement, the particular remedy ordered by the Board not only must be designed to restore the status quo ante, it also must be consistent with the underlying objectives of the Act. The nonmajority bargaining order entered at bar fails to fulfill either criterion. That the Board's order is not designed or intended to restore the status quo ante is obvious. Because there has never been a freely chosen majority representative in the circumstances at bar, the Board's order goes significantly beyond the reestablishment of preexisting conditions.

Beyond the status quo ante question, the order here exceeds the Board's authority because it is inconsistent with the Act's objective of promoting freedom of choice. In *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), the Court confronted an analogous situation. There, the Board employed its remedial authority to order an employer to accept a dues check off provision as a part of a collective bargaining arrangement; but this Court held that the Board's remedial authorty did not extend so far:

> The Board's remedial powers under §10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under govern-

> mental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

397 U.S. at 108 (footnotes omitted).

The fundamental principle of the Act that the Court deemed sufficient to override the Board's remedial authority in *Porter*—freedom of contract—stands in *pari materia* to the principle implicated at bar—freedom of choice. The Court's conclusion that a cardinal tenet of the Act cannot be violated in the name of an inovative remedy designed to foster the Act's objectives precludes enforcement of the bargaining order entered here. Although less drastic sanctions may not meet with the approval of a slim majority of the Board, the authority to impose the remedy at issue must eminate from Congress.[7]

D. The Order Transcends The Board's Role In The Administration Of National Labor Policy

The comprehensive statutory scheme that governs labor relations in this country grew out of strife and turmoil in the workplace which spilled across the lines of interstate commerce. To calm the disturbances that had adversley affected the productive capacity of the nation, Congress provided workers with a federally protected right to select representatives of their choice to bargain collectively on matters concerning their employment. "The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." *H.K. Porter v NLRB*, 397 U.S. 99, 103 (1970).

To breathe life into the paper guarantees embodied in the Act, Congress created the NLRB. Notwithstanding the wide variety of functions and broad remedial authority that the Act

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[7] "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy ...." Colgate Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 363 (1949); *see* Linden-Lumber Division v. NLRB, 419 U.S. 301, 317 (1974).

reposes in the Board, there is nothing in the legislative language that endows the Board with direct involvement in the collective bargaining process.

The remedial powers entrusted to the Board, ranging from cease and desist orders to injunctive authority, are meaningful and effective. Those powers may be invoked to compel adherence to the rules governing collective bargaining, but may not be employed to inject the Board into the bargaining process. Thus, the Act's concern for freedom of contract precludes the Board from invoking its remedial authority to control the terms of a bargaining agreement. By virtue of the same principle, the Act's concern for employees' freedom of choice precludes the Board from invoking its remedial authority to select a particular bargaining representative.

In this case, the Board injected itself into the process by selecting a bargaining representative in derrogation of its obligation to protect freedom of choice.[8] It has shown favoritism by summarily elevating a representative that was neither elected nor supported by a majority of those on whose behalf it is authorized to negotiate. For the Board to arrogate unto itself the power to issue nonmajority bargaining orders "where the actual desires of the majority may be easily and readily ascertained at any time, would be to force men into unions and into dealing with their employers through unions contrary to the employees' own wishes. The statute has no such purpose." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 697-98 (1944) (Rutledge, J., dissenting).

Because the authority to enter a nonmajority bargaining order unnecessarily injects the Board into the collective bargaining process, the D. C. Circuit struck an appropriate balance in concluding that an order of this nature is beyond the Board's remedial authority.

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[8] "[N]ot only has their employer trampled on their rights, but now the federal government in distant Washington has imposed its will on the employees. In many ways, the destruction of employee choice by the Board is more serious than the employer's unlawful conduct because the new transgressor, the Board, is the governmental agency that is supposed to protect employee freedom of choice." Hunter, *Conair: Minority Bargaining Orders Usher In 1984 at NLRB*, 33 Labor L.J. 571, 579 (1982).

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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